KF (Removal directions and statelessness) Iran [2005] UKIAT 00109

IMMIGRATION APPEAL TRIBUNAL

Date: 19 November 2004
and 1st March 2005
Date Determination notified:
07/06/2005

Before:

The Honourable Mr Justice Ouseley (President)
Miss K Eshun (Vice President)
Mrs L H S Verity

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT
APPELLANT

RESPONDENT

Appearances:
For the Appellant: Ms R Brown, Home Office Presenting Officer; Mr P Patel at the resumed hearing.
For the Respondent: Mr J C Shah, instructed by Dozie & Co; Mr E Pipi at the resumed hearing.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of an Adjudicator, Ms P Lingam, promulgated on 26 March 2004. She allowed the Claimant's appeal on the basis of what were described as two preliminary issues: the Claimant's alleged statelessness and the invalidity of the removal directions.

2. The Claimant sought asylum in the United Kingdom in September 2003, not long after he entered illegally from Turkey. (The Adjudicator notes entry as being a year earlier, but that must be an error judging by the interview material and his claim to have left after the fall of Saddam Hussein.) He was born in 1972 in Iran. He and his parents were captured in 1976, when he was aged four, by Iraqi forces attacking Iran. They ended up in a camp in Iraq where his father died. He started working when he was fifteen and when he was eighteen, the Iraqi authorities issued him with a green paper, renewable annually. After the fall of Saddam Hussein, the camp was

attacked by local people because of their Kurdish ethnicity. He and his family fled to Baghdad, where they hid until he left in fear of his life.

3. There was no dispute about the claim of birth in Iran or the circumstances which led to the Claimant being in Iraq. Since the end of the Iran-Iraq war, there have been disputed nationality issues between the two countries arising from the many refugees in their territories.

4. The Claimant said that he was no longer a citizen of Iran and objected to his removal there, and continued that he could not be returned to Iraq because he was a refugee from Iraq. The Secretary of State in his refusal letter of 4 November 2003 pointed out that many Iranian refugees had returned from Iraq, that many formal papers relating to birth or marriage issued in Iraq were recognised by Iran and that there were many Iranians Kurds who lived in the Kurdish areas of Iraq.

5. The Secretary of State refused asylum, said that his removal would not be contrary to the ECHR and sent a Notice of Decision which included, against the side note "*Removal Directions*" the statement that "*Directions will be given for your removal from the United Kingdom to Iran*".

6. The Adjudicator described the endeavours made by the Claimant to obtain Iranian nationality papers. These appear only to have been made after this refusal. His letter to the Iranian Embassy dated 19 January 2004, though headed, at least in translation, "*Visa Entry*", makes it clear that the Claimant is seeking to return for good to the country where he was born, and has no documents or other nationality. It also described briefly how he came to be in Iraq and said that his parents had Iranian nationality and papers. He had filled in the visa application form with which he was issued and said on it that he wanted to stay for good.

7. Neither we, nor the Adjudicator so far as we can see from the file of material before her, had the complete form. There may have been questions about the parents' nationality which are on the part which we do not have. But the Claimant, although answering the question about his birthplace by writing "*Iran*", simply put a line through the place for answers to the questions as to his past or present nationality. So it contained no apparent assertion as to nationality or that he was seeking the papers as a national. There may well be other relevant questions but we have not seen them because only the one face of the form was copied.

8. The Adjudicator said that the Claimant had said that when he attended at the Iranian Embassy with the form, he was told that his application had been unsuccessful. She continued, at paragraph 11:

> "There are also telephone attendance notes by his solicitors but it is regretful that the person who made the calls did not see fit to put in an affidavit regarding the calls made to the UNHCR and the Iranian Embassy."

9. There is one fifteen minute call to the Embassy which does not appear to have dealt with this Claimant by name; rather it was a general request for information about how a national who did not have the necessary documents could return to Iran. The answer was that a refugee from Iraq would be allowed to return to Iran, but needed proof of identification. They did not have a written document saying that. There was no written follow-up to the refusal or to the conversation. The UNHCR rather vaguely said that it thought that a document would be required for an Iranian refugee from Iraq to return.

10. The Adjudicator then set out two extracts from the CIPU Report saying:

> "Nevertheless the CIPU Report at paragraphs 5.7 confirms 'citizenship is based upon the Iranian Civil Code which stipulates that in general birth within the territory of Iran does not automatically confer citizenship. Some instances where birth does confer citizenship are when a child is born to unknown parents, children born to non-citizens, one of whom was born within Iran or a child born to non-citizens, if after reaching the age 18 the child continues to live within Iran for at least one year …'. At paragraph 5.9 of the report confirms 'Iranian citizenship may be acquired upon fulfilment of the following conditions: the person must be at least 18 years of age, have resided in Iran for five years, not be a military service escapee and not have been convicted of a major crime in any country …'."

11. She then said that she accepted that the Claimant was unable to fulfil the requirement set out in paragraph 5.9 of the CIPU Report, that he had resided in Iran for five years, and confirmed:

> "I accept in line with Revenko that even if he were to lodge a proper citizenship application, he is unlikely to be considered for Iranian citizenship due to his lack of appropriate residence in Iran. It is therefore probable that Iran is unlikely to accept the appellant upon return."

12. The Adjudicator next turned to the "removal directions", and the provisions of paragraphs 8 to 10 of Schedule 2 to the 1971 Immigration Act. She rejected the applicability of each in turn: (i) because the Claimant was not likely to be seen as a national of Iran as he had left aged four; (ii) because, although he had Iraqi identity papers of a sort, he was not being returned to Iraq; (iii) because, although he had come via Turkey, Turkey was not the proposed

country of removal; and (iv) because there was no other country to which there was reason to believe he would be admitted.

13. That led her to say in paragraphs 15 and 16:

> "15. I therefore accept that the Removal Notice dated 5 November 2003 is invalid because it is not in accordance with the law.
>
> 16. For the purposes of clarity, I also accept according to Revenko that the appellant's statelessness in no way qualifies him to be a refugee under the Geneva Convention. I therefore allow the appellant's appeal for the sole reason that the Removal Notice of 5 November 2003 is invalid."

14. The Adjudicator, submitted the Secretary of State, had erred in dealing with either or both issues, statelessness and the validity of the removal directions, as preliminary issues. Statelessness by itself was not a sufficient answer, even if properly found, to the question of whether someone was entitled to protection under the Refugee Convention.

15. In any event, there was no adequate basis for any conclusion, if there had been one, that the Claimant was stateless. The analysis, set out above, of the factual material was wholly inadequate to support any such conclusion. Various aspects of the CIPU Report had been ignored, and no consideration had been given to the availability of nationality to the Claimant as the child of Iranian nationals. The possibility of return to Iraq ought also to have been considered.

16. Mr Shah for the Claimant submitted that the Adjudicator had made a finding as to statelessness, and that she was entitled to do so on the totality of the evidence.

Conclusions on statelessness

17. The Adjudicator clearly appreciated correctly that a finding that someone was stateless did not of itself determine whether he was a refugee within the Geneva Convention; Revenko [2000] Imm AR 610 Court of Appeal. She did not go on to determine the asylum claim, because she concluded that that issue was irrelevant because of her conclusions on the removal directions.

18. That is unfortunate because the Adjudicator's conclusions on the removal directions were at least arguably wrong. It is unwise for Adjudicators to deal with cases on the basis of a preliminary point; the same is nearly always true at Tribunal level. The factual issues should be resolved so that if any issue of law is decided wrongly, it is more likely that the case can be resolved finally at appeal level without a remittal for the factual issues to be resolved.

19. The conclusion that the Claimant was stateless was wrong in law on the evidence, or inadequately reasoned. The reality is that the Claimant was asserting to the Adjudicator that he was an Iranian national. He would not become stateless simply because his country of nationality would not permit him entry, and certainly not because it would not permit entry on the basis of the very modest endeavours of the Claimant. The Claimant said at his screening interview (C7), which the Adjudicator overlooked, that he had no evidence with him to show where he was from, but his Iranian ID was with his parents in Iraq; he could produce it in two to three weeks. There was no dispute before us but that that is the correct interpretation of the answer at 2.44, and that that was in fact correct.

20. It is not always surprising that less than vigorous endeavours may be made by asylum applicants to obtain proof of nationality. Their endeavours to obtain nationality documents might prove successful. But to fail to assert the relevant nationality and the basis for it, to fail to seek the right documents, or to follow up a refusal with letters, or to seek further assistance, legal or NGO, in pursing the claim or to produce to the asserted country of nationality those documents which are obtainable is to fall well below the minimum necessary for any claim of statelessness. He has not been deprived of citizenship but claims that the country of nationality will not recognise him. That is a very difficult basis upon which to prove statelessness and is nowhere near satisfied here.

21. The Adjudicator also misinterpreted the CIPU Report which she quoted. Granted that the Claimant did not fulfil the citizenship requirements in paragraph 5.9, she failed to appreciate that that was expressing an unusual way for citizenship to be acquired. She also failed to appreciate the significance of paragraph 5.7; we have seen the underlying source document but its meaning is clear enough anyway.

22. It is clear that although birth in Iran does not automatically confer citizenship, and that the Appellant is not within the exceptional categories, the child of an Iranian father regardless of the country of its birth is Iranian. The CIPU Report deals with exceptional ways of acquiring nationality; those assume the existence of more common ways. The commonest is descent, which would usually but not necessarily involve birth in Iran from an Iranian father. But it is the father's nationality which legally is crucial.

23. The finding of statelessness was therefore legally erroneous.

24. At this stage, the Tribunal was satisfied that the appeal had to be allowed and the case remitted for further consideration by an Adjudicator other than Ms P Lingam. Mr Pipi pointed out that

evidence of a denial of citizenship rights or identity papers to a particular section of the population within which a claimant falls may also be indicators of statelessness. He is correct but that related to Iraq here and does not alter the conclusion.

Removal Directions and the country of proposed removal

25. We also saw force in the arguments put forward by Ms Brown, which we have not yet elaborated, as to why the Adjudicator had erred in allowing the appeal on the grounds that there were removal directions which were invalid by reference to paragraph 8 of Schedule 2 to the 1971 Immigration Act. We saw a link between the availability of such an argument, the uncertain significance of the country specified in the Notice of Decision and the obligation or otherwise to consider return to Iraq. It would also have been unfair on the parties and on the new Adjudicator on a remittal for the Tribunal not to have said whether the Adjudicator had to consider removal to any country other than Iran, notably Iraq, if the Claimant were found to be stateless or not of Iranian nationality.

26. We concluded that, without disrespect to any of the advocates' submissions in those cases, further argument was necessary on these points. The first resumed hearing proved abortive as the Secretary of State had not yet resolved his stance on the questions which we had earlier posed. The hearing was resumed on 1 March 2005.

27. It is convenient here to set out the relevant statutory provisions, relevant to whether an appeal lies against removal directions or against an immigration decision on the ground that the country of proposed destination falls outside the relevant provisions of the 1971 Immigration Act, here Schedule 2 paragraph 8.

28. Schedule 2 paragraph 8(1)(c) provides for removal directions to the following countries to be given to a carrier:

> "(i) a country of which he is a national or citizen; or
> (ii) a country or territory in which he has obtained a passport or other document of identity; or
> (iii) a country or territory in which he embarked for the United Kingdom; or
> (iv) a country or territory to which there is reason to believe that he will be admitted."

29. The basis for removal directions being given to a carrier is section 4(2)(c) of the 1971 Act which provides:

> "The provisions of Schedule 2 to this Act shall have effect with respect to-
>
> (c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United

> Kingdom of persons refused leave to enter or entering or remaining unlawfully;"

Section 5 deals with deportation orders and subsection (5) deals with removals of those against whom deportation orders are in force, by reference to Schedule 3, which permits removal directions to countries within paragraph 8(1)(c) (i) and (iv) of Schedule 2. Mr Patel for the SSHD at the resumed hearing said that removal directions were the invariable accompaniment to removals.

30. Section 82(2) of the Nationality, Immigration and Asylum Act 2002 sets out the appealable immigration decisions. The relevant one for an ordinary illegal entrant, as here, is (h), which is:

> "a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c.77) (control of entry)."

31. It is also worth noting that (g) and (i) also refer to removals but in (g) "*by way of directions under section 10(1)(a), (b) or (c) of the Immigration and Asylum Act 1999 (c.33) (removal of person unlawfully in United Kingdom)*" and (i) "*by way of directions given by virtue of paragraph 10A of that Schedule (family)*". In each of (g), (h) and (i) the appealable decision is described as "*a decision that a person be removed …*".

32. The relevant grounds of appeal against such a decision are set out in section 84(1). We note (1)(c), (e) and (g), the latter in particular.

> "(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c.42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;
>
> (e) that the decision is otherwise not in accordance with the law;
>
> (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

33. The contrast with the preceding statutory language is relevant. There are no equivalent provisions to those in the 1999 Immigration and Asylum Act which provided for appeals against the country of destination specified in directions where an appellant put forward an alternative (sections 59 and 67). The language of section 66(2), which provided for an appeal against removal directions "*on the ground that on the facts of his case there was in law no power to give them on the ground on which they were given*", is not repeated. This provision was considered by the Court of Appeal in Zecaj [2002] EWCA Civ 1919, [2003] Imm AR 298 which held that that provision meant that an appeal lay where the ground given

under section 66(1) for the proposed removal did not entitle the Secretary of State to remove the individual in question; it did not apply to the individual as a matter of law, on the facts of the case.

34. Section 69(5) of the 1999 Act, the asylum appeal, provided for an appeal on the ground that "*removal in pursuance of the directions*" would breach the Convention. Section 65(1) and (4), the ECHR appeal, referred to "*any decision … relating to that person's entitlement to enter or remain the United Kingdom*". This matter was considered in R (Kariharan and others) v SSHD [2002] EWCA Civ 1102, [2003] Imm AR 163. It concluded that removal directions, with or without a prior decision as to leave or illegality of entry, were a "*decision*" within section 65, and were also decisions "*relating to that person's entitlement to … remain*". The particular issue of an appeal directed to the country of destination by reference to Schedule 2 to the Immigration Act 1971 was not raised.

35. The Immigration (Notices) Regulations 2003 S.I. No 658, in force on 1st April 2003, provide in Regulation 4(1):

> "4 – (1) Subject to regulation 6, the decision-maker must give written notice to a person of any immigration decision or EEA decision taken in respect of him which is appealable."

Regulation 5(1) provides:

> "5 – (1) A notice given under regulation 4(1) is to –
> (a) include or be accompanied by a statement of the reasons for the decision to which it relates; and
> (b) if it relates to an immigration decision specified in section 82(2)(a), (g), (h), (i) or (j) of the 2002 Act, state the country or territory to which it is proposed to remove the person."

The immigration decisions for which the Regulations require a country of proposed removal to be specified are the three which involve removal by way of directions (unlawful presence (g), illegal entrant (h) and family (i)), plus refusal of leave to enter (a) and a decision to make a deportation order (j).

The reason for the distinction between the various subsections appears to relate to the general absence of an in-country right of appeal except under section 82(2)(c), (d), (e), (f) and (j); section 92(2). But this is subject to a general exception where an asylum or human rights claim is raised in the UK; section 92(4)(a).

36. The questions which we asked of the parties beforehand so as to assist their submissions were these:

(a) If it is concluded on the facts that the proposed country of removal falls outside the scope of paragraph 8 of

Schedule 2 to the 1971 Act, is that fact irrelevant to the appeal?

(b) If it is relevant, should the result be dismissal of an appeal because there would be no removal, or allowing of the appeal if either Convention would be breached on removal to that country?

(c) Under what circumstances should an Adjudicator or the IAT examine any other country which fell within the scope of Schedule 2, although not currently proposed as a country of removal?

(d) Should a Claimant seek to deal with all countries which fell within paragraph 8 of Schedule 2?

(e) If the Claimant here was stateless, did Iran become irrelevant and did Iraq which was not the country of proposed removal become relevant?

(f) If the Claimant were not stateless, might both Iran and Iraq be considered?

37. We now turn to the submissions made by the parties on the question of whether an appeal could be brought against removal directions, the first ground of appeal by the Secretary of State, and as to the significance of the country of proposed destination in the Notice of Decision. The later advocates argued along the same lines as their forerunners.

38. The Adjudicator had erred in law, submitted Mr Patel, because she had no power to say that a removal direction was invalid or not in accordance with law. Section 82 of the Nationality, Immigration and Asylum Act 2002 did not permit an appeal against removal directions as such. Section 82(2)(h) only provided for an appeal against the decision to remove and the effect of section 84(1)(e) was that an appeal on the grounds that that decision was not in accordance with the law did not enable the country of destination to be raised. The provisions of the 2002 Act thus contrasted with sections 66(2), 67, 68 and 69(5) of the 1999 Act. There was no longer an appeal against the country of destination in removal directions. In effect, though not so expressed, her argument was that the decision of the Court of Appeal in Zecaj [2002] EWCA Civ 1919, [2003] Imm AR 298, had been given statutory confirmation. The ground for the decision to remove had to be shown to be invalid, such that the reason given for proposed removal did not entitle the Secretary of State to remove the individual in question. The country of removal was irrelevant to the lawfulness of the decision to remove and there was now no separate appeal against the country of removal.

39. Mr Patel submitted that section 82(2) permitted an appeal to be brought only against an *"immigration decision"* as defined; here a *"decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971."* The other subsections which included reference to directions were in the same form. The reference in the grounds of appeal available under section 84(1), and (g) in particular, to *"removal…in consequence of the immigration decision"*, suggested a distinction between the immigration decision and removal directions. The Notices Regulations only required notice to be given of an appealable immigration decision, which must necessarily already have been reached before notification of it in accordance with the Regulations could be required. Removal directions related to the stage subsequent to the immigration decision appeal. The Explanatory Notes to the 2002 Act referred to the initial immigration decision as being the only appealable decision and not now consequential removal directions.

40. The legislative structure was supported by practice: first IND serves notice (IS151A) informing the individual of his immigration status i.e. that he is an illegal entrant/overstayer/in breach of his leave; second, and in this case on the same day, IND serves a notice of decision (IS151B) to remove him under the appropriate provision, here by way of directions under the 1971 Act; third, directions are given to the carrier for the removal in form IS151D. The Notices Regulations bit at stage two and that was the only stage at which an appeal could be brought.

41. Hence, the appellant had to contend that he was not an illegal entrant or that his removal would breach the two Conventions. Liability to removal had to be established and could be appealed before any question of the mechanics of removal could arise. The inclusion of a country of proposed removal in the Notice of Decision was not the giving of removal directions nor did it serve the same purpose. Its purpose was to enable the individual to "*ventilate*" the asylum and human rights issues and the legal basis for the assertion that he was an illegal entrant, overstayer or as the case might be. It was to be contrasted with the viability or practicability of the destination in terms of Schedule 2 to the 1971 Act. If removal directions were given which fell outside the scope of the Schedule, their lawfulness could be challenged by way of judicial review.

42. Mr Patel drew support for his analysis from the decision of the Tribunal in MY (Somalia) (Disputed Somali nationality) [2004] UKIAT 00174*. That case concerned the problem of decisions in which the Secretary of State, contesting the asserted nationality of the individual, nonetheless proposed to remove him to the country of

which the Secretary of State, but not the individual, denied he was a national. This country was therefore on the Secretary of State's primary contention outside the scope of Schedule 2 to the 1971 Act.

43. Although the problem here is different in nature and that case concerned the 1999 Act which is different in a number of significant respects, it is worth setting out the passages relied on:

> "30. Section 69(5) specifically provides for a right of appeal in asylum cases against removal directions in certain circumstances. There is no reason why Parliament should have enacted section 69(5) if there was an adequate right of appeal for all against such directions already inherent in section 69(1). We do not accept Mr Gill's submission that section 69(5) was simply a carry over from previous legislation, and that that explains why a separate appeal provision in relation to removal directions was provided for illegal entrants. It is clear from *Zecaj* that the right of appeal under subsection (5) is limited to the ground specified in section 66(1), and that the section 66 appeal itself is limited. The effect of *Zecaj* is that the ground of an appeal must be that the subsection (1) ground did not apply to the Appellant on the facts as a matter of law. It would be necessary for the directions to have been given on the ground that the Appellant was an illegal entrant, or an overstayer, or had obtained leave to remain by deception, was a member of a family for which one had received removal directions, or was a crew member. None of these were relied on by the Secretary of State. So no appeal lay under section 66. It would be bizarre if the restrictions in section 69(5) and 66 could be sidestepped by an appeal under section 69(1). The language of section 69(1) also refers to "*ground*" in the singular; it does not import a further ground relating to removal directions.
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> "32. The Notice is inaccurate in referring to an appeal on the ground that "*removal in pursuance of these directions"* would breach the Geneva Convention. The statutory provision to which it relates refers rather to removal in consequence of the decision to refuse leave to enter; it does not refer to removal directions at all and the provision which does is not referred to as the ground of appeal. Nonetheless we do not consider that that can be seen as altering the true scope of section 69(1)."

44. Mr Patel also relied on the Tribunal decision in SG (Bhutan) [2005] UKIAT 0005 in which it was held that the 2002 Act conferred no right of appeal against proposed removal directions; it did not appear that destination was capable of being the subject matter of an appeal.

45. We asked Mr Patel for submissions on the questions which we had asked which went to the relevance of the country of proposed destination, if he were right in his submissions above. He was in agreement with Mr Pipi that the ascertainment of whether someone was a refugee or not did not depend on the country of proposed removal specified in the Notice of Decision; indeed it did not depend on any removal being proposed at all.

46. If someone was a refugee, or if an ECHR claim were made, it would be necessary to consider whether removal would breach either Convention by reference to the country of proposed destination in the Notice. It would be necessary for the appeal also to consider other countries to which the individual might be returned. In this instance, it would be necessary for the Adjudicator to consider whether return to Iraq, as the country of former habitual residence, would breach the Refugee Convention if the Claimant were found to be stateless. This was notwithstanding that the Secretary of State had not said that he would return the Claimant to Iraq even on the basis of that contingency. The Adjudicator ought also to consider return to Iraq for the purposes of the ECHR because that would be a sensible approach enabling the issues to be dealt with in one go, again even though the Secretary of State had not said that he would return the Claimant there.

47. Iraq was for consideration also because it had been raised and it would not be unfair to deal with it. As an aspect of case management, an Adjudicator might raise another country and indicate that a fresh or amended Notice of Decision should be issued. The decision-maker should adopt what he said was the "*belt and braces*" approach of the Tribunal in Agartha Smith HX/88505/97, in which the Tribunal considered the risk of a breach of the Refugee Convention in returning someone to a country of which it had found she was not a national, so that she had a considered determination of her claim on the basis of her asserted nationality.

48. He accepted that the logic of his argument was that the Appellant had only one opportunity to appeal against the immigration decision as he defined it. This was the purpose of the statutory structure. It was to embody in clearer form the decision of the Court of Appeal in Zecaj, and to overturn the effect of the Court of Appeal in Kariharan.

49. When challenged as to the consequence of that for the subsequent setting of removal directions for a country which had not been considered or the subject matter of the proposed destination in the Notice of Decision, he recognised that this could give rise to problems for those whose Convention rights could be breached by removal to that country but who had not had any judicial determination of their appeal on that basis. The answer was that the Secretary of State would avoid the problem by giving to such individuals a fresh N0tice which would constitute a fresh appealable decision; he would not move directly to the issue of removal directions.

50. There might be scope for debate as to whether Iraq fell within the scope of Schedule 2 to the 1971 Act in relation to this individual; and the scope might be greater or lesser in any individual case

depending on the facts. Iraq would not come within paragraph 8(1)(c) (i) or (iii) and it would be for factual resolution as to whether he came within (ii) by reference to identity documents or (iv) by reference to a belief that Iraq might be willing to admit him. Nonetheless, if Iraq were not dealt with in the appeal, a decision to remove him there could be made and the availability of an appeal would depend on the administrative machinery of the Secretary of State. If such a practice were ignored by the Secretary of State that could of itself found Judicial Review. If Iraq were dealt with in the appeal, the appeal might indirectly consider those factors which were relevant to the application to Iraq of Schedule 2. But no final or binding decision could be reached on whether Iraq fell within schedule 2 in relation to this Claimant. After all circumstances might change and what was previously not possible might in future become so.

51. Mr Pipi for the Claimant at the resumed hearing submitted as follows:-

(1) "*immigration decisions*" as defined had to be lawful, and their lawfulness could be appealed pursuant to section 84(1)(e), that it was not in accordance with the law, quite apart from breaches of the two Conventions or of the Immigration Rules. A decision to remove someone to a country to which removal was not lawful because it fell outside paragraph 8 of Schedule 2 to the 1971 Act could be appealed against on that ground. Parliament could not have intended that say, a Russian could be removed to Nigeria regardless of paragraph 8. The fact that Iran fell outside Schedule 2 strengthened the claim that he could not be removed there.

(2) If removal to any country which fell within Schedule 2 paragraph 8 would involve a breach of the Conventions, the appeal should be allowed.

(3) In general agreement with Mr Patel, an Adjudicator should examine countries other than the one in the Notice of Decision, where nationality was disputed, or there were "*genuine difficulties in ascertaining the correct country of removal*". The Secretary of State ought to specify proposed countries of removal in the alternative, which would be procedurally fair.

(4) Consequently, an Appellant should deal with all Schedule 2 paragraph 8 countries, though it would be more efficient and fairer if the Secretary of State identified those which were candidates for consideration. He also said in answer to the Tribunal that the country of proposed removal was an integral

part of the decision and that without it, there was no decision. The decision could be amended to add another country.

(5) Therefore, if the Claimant were stateless, Iran became irrelevant though specified and Iraq fell to be considered even though it was not specified.

(6) Both Iran and Iraq might be considered, subject to the Claimant being put on notice if he were not stateless.

(7) The Adjudicator, having concluded that the Claimant was stateless, ought to have considered whether he was nonetheless a refugee by reference to Iraq and ought to have concluded that he was a refugee because that country was no longer his country of former habitual residence because it was no longer willing to admit him, and provide protection. He sought permission to serve a Respondent's Notice in support.

Conclusions on removal directions and the country of proposed removal

52. The Adjudicator first erred in law in treating the "*Removal Notice*" as invalid because the country of proposed removal was outside paragraph 8 of Schedule 2 to the 1971 Act. The immigration decision, as she regarded it, could not itself have been "*invalid*", for that reason. She must have been treating the Notice of Decision as constituting or containing Removal Directions, because of the side note. But those are not Removal Directions at all; it merely says to what country such directions will be given; see also the analysis in paragraph 22 and 23 of MY (Somalia)* It is simply the statement of the country of proposed removal required by the Notice Regulations.

53. We have to say that much of the confusion in this area, and the Adjudicator's misconception here is not uncommon, is caused by the potentially misleading side note "*Removal Directions*" on Form IS151B.

54. Second, it is clear that there is no appeal available against removal directions, as such. Removal directions are not of themselves "*immigration decisions*" within section 82, and the specific provisions for destination appeals relating to removal directions in the 1999 Act have been removed.

55. If it had been intended to create a separate appealable decision in respect of the country stated in Removal Directions that would have been done explicitly, given the tidying up of the appealable decisions. Were that to have been done, provision would also have been made to avoid the practical problems which the overturned Tribunal decision in Zecaj created for those whose nationality was

unknown or contested: an illegal, removable entrant's appeal succeeding because the Secretary of State rejected the claimed nationality but did not yet know what the real nationality was. There are no equivalents to the previous grounds of appeal. Section 82 is a provision which embodies the result of Zecaj and expresses the purpose of section 66(2) of the 1999 Act in rather clearer language. This was a further error by the Adjudicator.

56. We assume without deciding that the effect of section 4 of the 1971 Act is to require removal directions to be issued as the means of enforcing any removal, and so are a legal necessity. The next question is whether an appeal can be brought against the proposed country of removal in the Notice of Decision on the grounds that removal directions for there when given would be outside paragraph 8 of Schedule 2 or the equivalent in Schedule 3 to the 1971 Act.

57. All this turns on the meaning of the "*immigration decision*" in section 82 of the 2002 Act. The relevant appealable "*immigration decision*" is that in section 82(2)(h). It is the decision that the Appellant is an illegal entrant, removable and to be removed through directions under Schedule 2, which is in question. It enables status, removeability and the basis in principle of removal to be the subject of an appeal. The decision is that removal, when it occurs, will be pursuant to directions under that Schedule. The country of proposed destination is not part of the immigration decision. The country of destination relates to the consequences of that decision and hence Convention breaches, and needs to be specified so that the available grounds of appeal relating to Convention breaches can be given concrete focus. The structure of the 2002 Act provisions is that of "*decision*", separated from the appeal grounds, which permit an appeal against the decision by reference to its consequences, i.e. removal to the country of proposed destination.

58. The purpose of the tailpiece reference in section 82(2)(h) to removal being by way of Schedule 2 directions is to deal with the basis of removal and contrasts with the basis for the removal of persons unlawfully in the United Kingdom (section 82(2)(g), administrative removal) and those being removed as family members (section 82(2)(i)).

59. The language of section 82 is different from the language of section 65 of the 1999 Act which led to the decision in Kariharan. Where removal directions embody the "*immigration decision*", that decision is appealable. Where the removal directions are the administrative consequence of an earlier appealable decision, which of course has to be notified and to identify the country of proposed destination, no appeal arises. The decision on status, removeability and the use of Schedule 2 directions has already been made in an appealable form.

It cannot now be said that removal directions are an appealable immigration "*decision*", in view of the definition and listing of appealable "*immigration decisions*". Nor has the language of decisions "*relating to*" entitlement to remain, been retained in the 2002 Act so as to provide an indirect link to an appealable immigration decision. Even less can it be said that the 2002 Act permits an issue as to the lawfulness under Schedules 2 or 3 to the 1971 Act, of the proposed country of destination to be raised. The language of the 2002 Act is clearly designed to overturn Kariharan.

60. Section 84 does not permit an appeal on the grounds that the proposed destination is outside Schedule 2. Removal in consequence of the immigration decision may or may not breach the ECHR or Refugee Convention but that does not turn on whether the country of proposed destination falls within Schedule 2 to the 1971 Act.

61. This conclusion is not affected by section 84(2)(e); the same question arises as to the content of the "*decision*" and whether it includes the specified destination country. The "*decision*" does not include the country of destination.

62. The conclusion that an appeal cannot be brought against the country of proposed removal on the ground that it falls outside the scope of Schedules 2 and 3 to the 1971 Act does not dispose of the issues which may be faced in this appeal. It means that the Adjudicator would have erred in allowing the appeal on a similar basis to the one upon which she did allow it but that does not answer the question as to the relevance of the country of proposed removal, Iran, in the Notice of Decision, nor whether the Tribunal should consider Iraq, were it found to be a country of former habitual residence or one to which the Claimant might be returned, if he could not be returned to Iran for reasons of Convention breaches.

63. The country specified in the Notice is not material for the determination of whether or not the Claimant is a refugee. The parties were rightly agreed on that. That is because the question of whether someone is or is not a refugee depends on whether he is outside his country of nationality or former habitual residence and not upon the country to which he might be retuned. The country of proposed removal is only relevant to whether his removal there would breach the Convention obligations in Articles 32 or 33 of the Refugee Convention, owed to someone who is a refugee. If a claimant cannot establish that he is a refugee, that questions does not arise; MY (Somalia)*.

64. The country specified is obviously critical to the ground of appeal, consequent upon removability being established, that removal

would breach either Convention. It is the country of removal which is capable of giving rise to the breach rather than removal in the abstract. The purpose of the specification of the country is to focus on the consequences of removal. It is irrelevant for these purposes that removal to the country in question would not be permissible under Schedules 2 or 3 to the 1971 Act.

65. If removal to the country specified would involve a breach of either Convention, the appeal would be allowed. It could not be dismissed on the basis that removal would be unlawful to that country because of the 1971 Act, would therefore not take place and so there would be no risk. Circumstances change any way. If the Secretary of State were to decide that he could remove the Claimant to another country, he would have to issue a fresh and appealable decision. Following the allowing of the appeal against his first decision.

66. If the appeal were dismissed on the basis that the removal would not breach either Convention but if the Secretary of State were later to decide that removal there would not take place because that would not be lawful under the Schedules to the 1971 Act, or even if the removal directions were quashed for the same reason on judicial review, the question arises as to whether the consequential intention to remove the Claimant to another country would generate a fresh decision which could be appealed. The Secretary of State position is that he would issue one as a matter of fairness but not as a matter of legal obligation.

67. The answer to our mind is that the mere issue of removal directions itself is not the appealable decision and, as we have said, the directions do not afford a specific ground of appeal. But the issue of them for a different country evidences the fact that a different appealable immigration decision must have been taken, even though it relies entirely on the same points as to status and removability as had already been upheld. The actual issue of removal directions, pursuant to the earlier decision and as a consequence of it, for the very country which has been considered does no such thing and so that would not give rise to a fresh decision. It is very important to avoid the legal safeguards being available as a matter of practice rather than of legal obligation even at the price of some straining at the bounds of the statutory structure.

68. The statutory structure is intended to give a full factual merits appeal in relation to risk on return to the country proposed for removal. It is not intended to give an appeal in relation to the first country proposed and to provide for a review challenge only in relation to any subsequently proposed. Alternatively, if removal directions are issued for a country other than the one in the earlier appealable Notice of Decision a fresh claim may be generated.

69. We prefer this analysis to the possible alternative canvassed in paragraph 53 of MY (Somalia)* to the effect that fresh removal directions for a different country might not give rise to a fresh appeal but would lead only to Judicial Review.

70. The next question is whether or not the appeal body in the one appeal can or should consider the removal of the Claimant to a country other than the one referred to in the Notice of Decision. The ground of appeal is whether or not removal in consequence of the decision would be a breach of either Convention. If only one country is specified, which is the invariable position, it is the only consequence of the removal which the Secretary of State is proposing. It cannot be said that he is proposing to remove the Claimant to any other country. The range of other countries would be potentially limited only by Schedules 2 and 3 to the 1971 Act and that would involve the establishment of the possible contenders by reference to them, even though the Secretary of State might have no intention of removing the Claimant to them anyway. That approach would be consistent with Mr Pipi's arguments but does not fit with the Secretary of State's.

71. We appreciate that it can be said that in reality the practical contenders would be limited but that does not help analyse the legal requirements. There are practical reasons, however, why the seemingly attractive solution which both parties appeared to support cannot be accepted. The very establishment of the list would be fraught with difficulty over who was to prepare it or when; it is difficult to see how the Secretary of State could nominate countries which he had not put on the Notice of Decision. It would be potentially very time wasting to consider countries which the Secretary of State had not said that he intended as the country of return.

72. This is reinforced by consideration of what decision should be made on the appeal. If it is concluded that removal to the country proposed would involve no breach of the Conventions but that removal to another would, how could the appeal properly be allowed? And if it could not be allowed, what would have been the advantage of considering it? Conversely, if removal to the proposed country of removal would breach the Conventions but removal to another would not, how could the appeal be dismissed? The range of powers to give directions on the outcome of an appeal is not broad enough to encompass the giving of directions that removal to one country would not be a breach but removal to another would be and to allow or dismiss the appeal accordingly, regardless of the decision notice.

73. We also have a very real concern about arguments arising as to whether it was fair for a country to be considered, and as to the uncertain focus on a country which may have seemed peripheral or unlikely, on a not very satisfactory basis, and yet then becomes the country of removal. The parties' arguments that the law reflects practicalities does not advance their point. To our minds they emphasise the limits placed on the scope of the appeal by the country in the Notice of Decision.

74. There is no "one-stop shop" provision which covers other possible countries of removal, requiring the Claimant to identify such countries. It is clearly for the SSHD to identify the country to which he proposes to remove someone whom he has decided to remove.

75. The IAT decision in Smith does not really deal with this type of problem at all. The practical solution which is in line with the requirements of the Act and the provision for Notice to be given of the country of proposed removal is that the issue of whether removal would breach either Convention is confined to the country in the Notice.

76. Therefore here the AIT should not consider the risk on return to Iraq, whether it concludes that there is a risk or not in return to Iran. It cannot conclude that return to Iran would not meet the requirements of Schedules 2 or 3 to the 1971 Act nor can it then proceed to consider Iraq in consequence. That is irrelevant to the appeal. The appeal should be allowed, if there is a risk on return to Iran, and in the case of the Refugee Convention, if he is also a refugee. A fresh decision referring to Iraq might then be issued. It is for the Secretary of State to give effect to the earlier decision subject to any directions from the Tribunal but those directions are limited, and do not include directions to consider other countries. It would simply be for the Secretary of State to decide whether to take a fresh immigration decision and refer to Iraq in the Notice or to grant some form of leave. It would not be open to him to issue removal directions to Iraq without generating a further appealable immigration decision.

77. The practical disadvantages of limiting consideration of removal to the country in the Notice of Decision is that the overall conclusion in any particular claim for asylum may involve a sequence of decisions and appeals. One solution which the parties canvassed in seeming agreement is that the Secretary of State can amend his Notice if representations in the course of the appeal or the evidence or indications from the appeal body, but not in the form of a determination of the appeal, suggest that a different country would be appropriate. We do not accept that the Secretary of State has power to amend the Notice of Decision, with the appeal carrying on from the stage which it had already reached. There is no such

power in any Rules. In effect he is issuing a fresh Notice which must comply with the Notice Regulations and which generates a fresh right of appeal. It may very well be that if the Appellant nonetheless continues with the appeal and relates his case to the new country, he will be taken to have waived any right to contend that the Secretary of State's decision or the appeal body's decision on the appeal was unlawful. But that does not alter the legal position.

78. The remaining possibility is that the Notice of Decision should refer to countries in the alternative, perhaps with the reason why set out in the accompanying letter. In this case the Notice might have said that removal was proposed to Iran or Iraq; the reason might have been that the Secretary of State intended to return the Claimant to Iran but if that were to involve a breach of either Convention, he intended to return him to Iraq. The appeal could then be allowed if neither country were acceptable because of the Conventions and dismissed if either was. The decision would make clear whether removal to one country alone would involve no breach of Convention rights.

79. Again this course has something to commend it in practical terms; but we do not regard it as the correct solution without much further consideration. The appeal determination has to be clear as to its consequences. Even if there were no difficulty in saying that the appeal was dismissed because removal in consequence of the Secretary of State's decision would be to the safe country rather than to the unsafe one, the Notice of Decision would have to be read with that determination in order for its consequences to be understood. We think that the Secretary of State Decision Notice should be clear as to its consequence when enforcement comes, it should be understood simply with the knowledge that the appeal against it has been allowed or dismissed and should not require the determination of the appeal body to be with it or understood properly before the consequences for the Claimant are clear. We think that the statutory framework reflects our provisional view on this.

80. It follows from what we have said that the Notice of Decision should refer only to the one country. If the appeal is allowed but the Secretary of State thinks that removal to another country would be within the Conventions, he can take a fresh appealable decision. If the appeal is dismissed and the country of proposed removal falls outside the Schedules and removal cannot therefore take place, the Secretary of State cannot issue removal directions for another country without necessarily generating a fresh appealable immigration decision.

81. Here, Iraq does not fall for consideration upon the remittal for reconsideration. The appeal must be determined by reference to

the grounds of appeal and those do not cover either the question of whether Iran would fall within the Schedules to the 1971 Act.

82. This is different from the position in MY (Somalia)*, where the Notice and accompanying letter were seen as containing a two stage decision that removal should be to Somalia, but not if he were not a Somali national; see paragraphs 47 to 52.

83. We are not intending to preclude more than one country being referred to, were that necessary, in those circumstances where return is via a transit country where that country nonetheless has to be entered. That sequence gives rise to different problems from the question of alternative or contingent countries of proposed removal.

84. We did not think that the proposed Respondent's Notice would advance our deliberations or avoid the remittal. We refuse leave for it.

85. Accordingly, this appeal is allowed to the extent of being remitted to the Tribunal for it to be dealt with other than by Ms Lingham. This determination is reported for what we say about statelessness, removal directions and the relevance of the country in the Notice of Decision.

MR JUSTICE OUSELEY
PRESIDENT